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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

WENDY WARSHAUER, individually) Case No.
and on behalf of all others similarly)
situated,)

Plaintiff,)

vs.)

DERMASET INC., and DOES 1-10,)
Defendant(s).)

CLASS ACTION

**COMPLAINT FOR VIOLATIONS
OF:**

1. VIOLATIONS OF
ELECTRONIC FUNDS
TRANSFER ACT, 15 U.S.C.
§1693 ET SEQ.
2. VIOLATIONS OF
CALIFORNIA BUSINESS
AND PROFESSIONS CODE
§ 17200, ET. SEQ
3. VIOLATIONS OF THE
CONSUMER LEGAL
REMEDIES ACT, CAL.
CIV. C. § 1750, ET. SEQ.

DEMAND FOR JURY TRIAL

1
2 Plaintiff WENDY WARSHAUER (“Plaintiff”), on behalf of herself and all
3 others similarly situated, alleges the following against Defendant DERMASET
4 INC. upon information and belief based upon personal knowledge:

5 **INTRODUCTION**

6 1. Plaintiff’s Class Action Complaint is brought pursuant to the
7 Electronic Funds Transfer Act, 15 U.S.C. 1693 et seq. (“EFTA”) and the California
8 Automatic Purchase Renewal Statute Cal. Bus. & Prof. Code § 17600, et seq.
9 (“CAPRS”).

10 2. Plaintiff, individually, and on behalf of all others similarly situated,
11 brings this Complaint for damages, injunctive relief, and any other available legal
12 or equitable remedies, resulting from the illegal actions of Defendant debiting
13 Plaintiff’s and also the putative Class members’ bank accounts on a recurring basis
14 without obtaining a written authorization signed or similarly authenticated for
15 preauthorized electronic fund transfers from Plaintiff’s and also the putative Class
16 members’ accounts, thereby violating Section 907(a) of the EFTA, 15 U.S.C. §
17 1693e(a), and Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b).
18 Additionally, Defendant failed to properly inform consumers of its autorenewal
19 terms, thereby violating Cal. Bus. & Prof. Code § 17600 *et. seq.* Defendant fails
20 to clearly and conspicuously disclose the terms of its autorenewal and additionally
21 conditions its purchase on an illegal “negative option” as defined by 15 U.S.C. §
22 8403. Plaintiff alleges as follows upon personal knowledge as to herself and her
23 own acts and experiences, and, as to all other matters, upon information and belief,
24 including investigation conducted by her attorneys.

25
26 3. Plaintiff alleges as follows upon personal knowledge as to herself and
27 her own acts and experiences, and, as to all other matters, upon information and
28 belief, including investigation conducted by her attorneys.

10. Plaintiff is informed and believes that at all relevant times, each and every Defendant was acting as an agent and/or employee of each of the other Defendants and was acting within the course and scope of said agency and/or employment with the full knowledge and consent of each of the other Defendants. Plaintiff is informed and believes that each of the acts and/or omissions complained of herein was made known to, and ratified by, each of the other Defendants.

FACTUAL ALLEGATIONS - EFTA

11. Defendant is an online cosmetics company that sells cosmetics to consumers, such as Plaintiff, through its website dermaset.com.

12. On January 21, 2020, Plaintiff visited Defendant's website where Defendant was advertising a 30-Day Trial of its product for \$4.95. The following is a picture of the advertisement:



1 13. After clicking on the “Try for 30 Days,” below the statements “Free
2 for 30-Days,” “2 month supply,” and “Pay Only Shipping & Handling,” Plaintiff
3 was presented with a form that stated “Introductory offer pay S/H” and “Where
4 should we send your 30-day trial?” plus a form collecting Plaintiff’s information
5 and a clickable button that stated “Rush my Order!”

6 14. Below this form, in smaller text, where hyperlinks to a “Privacy
7 Policy” and “Offer Terms.” The “Rush my Order!” button did not require
8 acceptance of any privacy policy or offer terms to complete the transaction.

9 15. Further, in yet even smaller text below the “Privacy Policy” and
10 “Offer Term” links, which were, again, below a large colorful advertisement above
11 and a larger form above, Defendant stated “Pay \$4.95 S&P, today w/30-Day Trial.
12 Call within 30 days & return to avoid monthly payments. Your card will be
13 charged \$179.00 day 30 after trial order. New tube sent every 60 days + \$4.95 S&P
14 at discounted \$139.00. Call anytime to cancel future shipments.”

15 16. On January 21, 2020, following the large advertisement and entering
16 the information into the form box which failed to require acceptance of any offer
17 terms, Plaintiff was charged on her debit card for the \$4.95 for shipping and
18 handling and sent the 2 oz “free trial” of cream.

19 17. Thereafter, on February 18, 2020, Defendant automatically withdraw
20 from Plaintiff’s debit card \$179.00 as part of a recurring transaction.

21 18. Defendant did not send any correspondence to Plaintiff confirming
22 the written terms of the auto-withdrawal or further explanation.

23 19. Plaintiff was surprised by this withdrawal and issued a charge back
24 through her bank account.

25 20. Thereafter, Defendant began seeking collection of \$259 through
26 letters and emails.

27 21. Defendant’s “free for 30 days trial” offer is what is known as a
28

1 negative option by the FTC, which is defined as “an offer or agreement to sell or
2 provide any goods or services, a provision under which the customer's silence or
3 failure to take an affirmative action to reject goods or services or to cancel the
4 agreement is interpreted by the seller as acceptance of the offer.” 16 CFR § 310.2.

5 22. Pursuant to 15 U.S. Code § 8403, it is unlawful to charge or attempt
6 to charge any consumer for any goods or services sold in a transaction effected on
7 the Internet through a negative option feature unless the “text that clearly and
8 conspicuously discloses all material terms of the transaction before obtaining the
9 consumer’s billing information,” “obtains a consumer’s express informed consent
10 before charging the consumer’s credit card, debit card, bank account, or other
11 financial account for products or services through such transaction;” and “provides
12 simple mechanisms for a consumer to stop recurring charges from being placed on
13 the consumer’s credit card, debit card, bank account, or other financial account.”
14

15 23. Defendant’s negative option sales scheme failed to satisfy all three
16 prongs, any of which is fatal and unlawful. The only text that disclosed any
17 material terms of the transaction was in significantly smaller text below the form
18 obtaining the consumer’s billing information—and after the transmission button.
19 Accordingly, Defendant failed to obtain a consumer’s express informed consent to
20 make such charges. Further, while Defendant accepted transactions through the
21 Internet, Defendant required cancellation to occur telephonically, which is not a
22 simple mechanism.

23 24. Because Defendant failed to conspicuously disclose all material
24 terms, it also failed to obtain Plaintiff’s express informed consent for the recurring
25 electronic fund transfers it thereafter made.

26 25. Further, Defendant did not provide to Plaintiff, nor did Plaintiff
27 execute, any written or electronic writing memorializing or authorizing these
28 recurring or automatic payments.

1 26. Plaintiff alleges such activity to be in violation of the Electronic
2 Funds Transfer Act, 15 U.S.C. 1693 et seq. (“EFTA”), and its surrounding
3 regulations, including, but not limited to, 12 C.F.R. §§1005.7, 1005.8, and 1005.9.

4 27. Plaintiff alleges such activity to be in violation of California’s
5 Automatic Purchase Renewal Statute Cal. Bus. & Prof. Code § 17600, et seq.
6 (“CAPRS”), and its surrounding regulations.

7 28. At all times relevant, Defendant made and continues to make
8 automatic renewal offers and continuous service offers, as those terms are defined
9 by Cal. Bus. & Prof. Code § 17600, et seq. (“California’s Automatic Purchase
10 Renewal Statute”) to Plaintiff and other consumers similarly situated.

11 29. At the time Plaintiff purchased the services, Defendant failed to
12 present Defendant’s automatic renewal offer terms or continuous service offer
13 terms in a clear and conspicuous manner, as defined by California’s Automatic
14 Purchase Renewal Statute, before the subscription or purchasing agreement was
15 fulfilled, and in visual or temporal proximity to Defendant’s request for consent to
16 the offer.

17 30. At the time Plaintiff purchased the services, Defendant charged
18 Plaintiff for an automatic renewal offer without first obtaining Plaintiff’s
19 affirmative consent to the agreement containing the automatic renewal offer terms
20 or continuous service offer terms.

21 31. Further, Defendant never provided Plaintiff with information
22 regarding how to cancel in a manner that was capable of being retained by Plaintiff.

23 32. On information and belief, Plaintiff alleges that Defendant’s policy
24 and practice is to engage in illegal and deceptive negative option sales to unfairly
25 surprise consumers with large recurring transactions as part of a “free trial” scam.
26

27 33. At the time Plaintiff purchased Defendant’s “free trial,” Plaintiff was
28 subjected to Defendant’s unlawful policies and/or practices, as set forth herein, in

1 violation of Cal. Bus. & Prof. Code § 17600, et seq.

2 34. The material circumstances surrounding this experience by Plaintiff
3 were the same, or nearly the same, as the other class members Plaintiff proposes
4 to represent, and Plaintiff and all putative class members were required to pay, and
5 did pay, money for the services marketed and sold by Defendant.

6 **CLASS ACTION ALLEGATIONS**

7 35. Plaintiff brings this action on behalf of herself and all others similarly
8 situated, as a member of two proposed classes (jointly “The Classes”). The first
9 Class (hereafter “The EFTA Class”) defined as follows:

10 All persons in the United States whose bank accounts
11 were debited on a reoccurring basis by Defendant
12 without obtaining a written authorization signed or
13 similarly authenticated for preauthorized electronic fund
14 transfers within the one year prior to the filing of this
Complaint.

15 36. The second Class (hereafter “the CAPRS Class”) is defined as
16 follows:

17 All persons in California whose bank accounts were
18 debited on a reoccurring basis by Defendant without
19 Defendant providing clear and conspicuous notice of the
20 recurring charges, including information on how to
cancel Defendant’s services within the four years prior to
the filing of this Complaint.

21 37. Plaintiff represents, and is a member of The EFTA Class, consisting
22 of all persons within the United States whose bank account was debited on a
23 recurring basis by Defendant without Defendant obtaining a written authorization
24 signed or similarly authenticated for preauthorized electronic fund transfers within
25 the one year prior to the filing of this Complaint.

26 38. Plaintiff represents, and is a member of The CAPRS Class, consisting
27 of all persons in California whose bank accounts were debited on a reoccurring
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1 basis by Defendant without Defendant providing clear and conspicuous notice of
2 the charges, including information on how to cancel Defendant's services within
3 the four years prior to the filing of this Complaint.

4 39. Defendant, its employees and agents are excluded from The Classes.
5 Plaintiff does not know the number of members in The Classes, but believe the
6 Classes members number in the thousands, if not more. Thus, this matter should
7 be certified as a Class Action to assist in the expeditious litigation of the matter.

8 40. The Classes are so numerous that the individual joinder of all of their
9 members is impractical. While the exact number and identities of The Classes
10 members are unknown to Plaintiff at this time and can only be ascertained through
11 appropriate discovery, Plaintiff is informed and believes and thereon alleges that
12 The Classes includes thousands of members. Plaintiff alleges that The Classes
13 members may be ascertained by the records maintained by Defendant.

14 41. This suit is properly maintainable as a class action pursuant to Fed.
15 R. Civ. P. 23(a) because the Classes are so numerous that joinder of the Classes
16 members is impractical and the disposition of their claims in the class action will
17 provide substantial benefits both to the parties and to the Court.

18 42. There are questions of law and fact common to the EFTA Class
19 affecting the parties to be represented. The questions of law and fact to the EFTA
20 Class predominate over questions which may affect individual EFTA Class
21 members and include, but are not necessarily limited to, the following:

- 22
- 23 a. The members of the Class were not provided with, nor did
24 they execute, written agreements memorializing the
25 automatic or recurring electronic payments.
 - 26 b. Defendant did not request, nor did it provide, Class members
27 with written agreements memorializing the automatic or
28 recurring electronic payments.

1 c. The members of the Class did not provide either a written
2 (“wet”) or otherwise electronic signature authorizing the
3 automatic or recurring electronic payments.

4 d. Despite not providing written or electronic authorization for
5 payments to be drawn from their accounts, Defendant took
6 unauthorized payments from Class members’ accounts.

7 43. There are questions of law and fact common to the CAPRS Class
8 affecting the parties to be represented. The questions of law and fact to the CAPRS
9 Class predominate over questions which may affect individual CAPRS Class
10 members and include, but are not necessarily limited to, the following:

11 a. Whether Defendant failed to clearly and conspicuously disclose
12 the terms of its auto-renewal charges prior to making such charges
13 to Class members’ cards;

14 b. Whether Defendant failed to obtain informed express consent for
15 such charges;

16 c. Whether Defendant failed to provide a simple method by which
17 Class members could cancel their auto-withdrawals; and

18 d. Whether Defendant failed to provide information to Plaintiff and
19 Class Members regarding how to cancel in a manner that is
20 capable of being retained by the consumer.
21

22 44. As someone whose bank account was debited on a reoccurring basis
23 by Defendant without Defendant obtaining a written authorization signed or
24 similarly authenticated for preauthorized electronic fund transfers, Plaintiff is
25 asserting claims that are typical of The Classes.

26 45. Plaintiff will fairly and adequately protect the interests of the members
27 of The Classes. Plaintiff has retained attorneys experienced in the prosecution of
28 class actions.

1 46. A class action is superior to other available methods of fair and
2 efficient adjudication of this controversy, since individual litigation of the claims
3 of all Classes members is impracticable. Even if every Classes member could
4 afford individual litigation, the court system could not. It would be unduly
5 burdensome to the courts in which individual litigation of numerous issues would
6 proceed. Individualized litigation would also present the potential for varying,
7 inconsistent, or contradictory judgments and would magnify the delay and expense
8 to all parties and to the court system resulting from multiple trials of the same
9 complex factual issues. By contrast, the conduct of this action as a class action
10 presents fewer management difficulties, conserves the resources of the parties and
11 of the court system, and protects the rights of each Class member.

12 47. The prosecution of separate actions by individual Classes members
13 would create a risk of adjudications with respect to them that would, as a practical
14 matter, be dispositive of the interests of the other Classes members not parties to
15 such adjudications or that would substantially impair or impede the ability of such
16 non-party Classes members to protect their interests.

17 48. Defendant has acted or refused to act in respects generally applicable
18 to The Classes, thereby making appropriate final and injunctive relief with regard
19 to the members of the Class as a whole.

20
21 **COUNT I:**
22 **VIOLATION OF ELECTRONIC FUNDS TRANSFER ACT**
23 **ON BEHALF OF THE EFTA CLASS**

24 49. Plaintiff reincorporates by reference all of the preceding paragraphs.

25 50. Section 907(a) of the EFTA, 15 U.S.C. §1693e(a), provides that a
26 “preauthorized electronic fund transfer from a consumer’s account may be
27 authorized by the consumer only in writing, and a copy of such authorization shall
28 be provided to the consumer when made.”

1 51. Section 903(9) of the EFTA, 15 U.S.C. § 1693a(9), provides that the
2 term “preauthorized electronic fund transfer” means “an electronic fund transfer
3 authorized in advance to recur at substantially regular intervals.”

4 52. Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b), provides that
5 “[p]reauthorized electronic fund transfers from a consumer’s account may be
6 authorized only by a writing signed or similarly authenticated by the consumer.
7 The person that obtains the authorization shall provide a copy to the consumer.”

8 53. Section 205.10(b) of the Federal Reserve Board's Official Staff
9 Commentary to Regulation E, 12 C.F.R. § 205.10(b), Supp. I, provides that “[t]he
10 authorization process should evidence the consumer’s identity and assent to the
11 authorization.” *Id.* at ¶10(b), comment 5. The Official Staff Commentary further
12 provides that “[a]n authorization is valid if it is readily identifiable as such and the
13 terms of the preauthorized transfer are clear and readily understandable.” *Id.* at
14 ¶10(b), comment 6.

15 54. Defendant debited Plaintiff’s and also the putative Class members’
16 bank accounts on a recurring basis without obtaining a written authorization signed
17 or similarly authenticated for preauthorized electronic fund transfers for the rates
18 charged from Plaintiff’s and also the putative Class members’ accounts, thereby
19 violating Section 907(a) of the EFTA, 15 U.S.C. § 1693e(a), and Section 205.10(b)
20 of Regulation E, 12 C.F.R. § 205.10(b).
21

22 55. Defendant has debited Plaintiff’s and also the putative Class
23 members’ bank accounts on a recurring basis without providing a copy of a written
24 authorization signed or similarly authenticated by Plaintiff or the putative Class
25 members for preauthorized electronic fund transfers, thereby violating Section
26 907(a) of the EFTA, 15 U.S.C. § 1693e(a), and Section 205.10(b) of Regulation E,
27 12 C.F.R. § 205.10(b).
28

COUNT II:

VIOLATION OF BUSINESS AND PROFESSIONS CODE § 17200
INDIVIDUALLY AND ON BEHALF OF THE CAPRS CLASS

56. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

57. Actions for relief under the unfair competition law may be based on any business act or practice that is within the broad definition of the UCL. Such violations of the UCL occur as a result of unlawful, unfair or fraudulent business acts and practices. A plaintiff is required to provide evidence of a causal connection between a defendant's business practices and the alleged harm--that is, evidence that the defendant's conduct caused or was likely to cause substantial injury. It is insufficient for a plaintiff to show merely that the defendant's conduct created a risk of harm. Furthermore, the "act or practice" aspect of the statutory definition of unfair competition covers any single act of misconduct, as well as ongoing misconduct.

UNFAIR

58. California Business & Professions Code § 17200 prohibits any "unfair ... business act or practice." Defendant's acts, omissions, misrepresentations, and practices as alleged herein also constitute "unfair" business acts and practices within the meaning of the UCL in that its conduct is substantially injurious to consumers, offends public policy, and is immoral, unethical, oppressive, and unscrupulous as the gravity of the conduct outweighs any alleged benefits attributable to such conduct. There were reasonably available alternatives to further Defendant's legitimate business interests, other than the conduct described herein. Plaintiff reserves the right to allege further conduct which constitutes other unfair business acts or practices. Such conduct is ongoing and continues to this date.

1 59. In order to satisfy the “unfair” prong of the UCL, a consumer must
2 show that the injury: (1) is substantial; (2) is not outweighed by any countervailing
3 benefits to consumers or competition; and, (3) is not one that consumers themselves
4 could reasonably have avoided.

5 60. Here, Defendant’s conduct has caused and continues to cause
6 substantial injury to Plaintiff and members of the CAPRS Class. Plaintiff and
7 members of the Class have suffered injury in fact due to Defendant’s charging
8 exorbitant auto-renewal charges without clearly and conspicuously disclosing such
9 charges or obtaining consent. Thus, Defendant’s conduct has caused substantial
10 injury to Plaintiff and the members of the CAPRS Class.

11 61. Moreover, Defendant’s conduct as alleged herein solely benefits
12 Defendant while providing no benefit of any kind to any consumer. Such deception
13 utilized by Defendant converted large sums of money from Plaintiff and CAPRS
14 Class members without clear and conspicuous notice or obtaining express informed
15 consent. This systematic scheme is tantamount to theft. Thus, the injury suffered
16 by Plaintiff and the members of the CAPRS Class is not outweighed by any
17 countervailing benefits to consumers.

18 62. Finally, the injury suffered by Plaintiff and members of the CAPRS
19 Class is not an injury that these consumers could reasonably have avoided.
20 Defendant misappropriated funds from Plaintiff and other consumers, and these
21 consumers suffered injury in fact due to Defendant’s unexpected autowithdrawals.
22 As such, Defendant took advantage of Defendant’s position of perceived power in
23 order to deceive Plaintiff and the CAPRS Class members. Therefore, the injury
24 suffered by Plaintiff and members of the CAPRS Class is not an injury which these
25 consumers could reasonably have avoided.

26 63. Thus, Defendant’s conduct has violated the “unfair” prong of
27 California Business & Professions Code § 17200.
28

FRAUDULENT

64. California Business & Professions Code § 17200 prohibits any “fraudulent ... business act or practice.” In order to prevail under the “fraudulent” prong of the UCL, a consumer must allege that the fraudulent business practice was likely to deceive members of the public.

65. The test for “fraud” as contemplated by California Business and Professions Code § 17200 is whether the public is likely to be deceived. Unlike common law fraud, a § 17200 violation can be established even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage.

66. Here, not only were Plaintiff and the Class members likely to be deceived, but these consumers were actually deceived by Defendant. Such deception is evidenced by the fact that Defendant had a duty to clearly and conspicuously disclose its automatic renewal terms, failed to do so, and misappropriated significant sums of money from Plaintiff and CAPRS Class members, who reasonably relied on Defendant’s advertising practices which emphasized the “free trial” nature of the transaction, causing considerable actual damages.

67. Plaintiff’s reliance is reasonable due to the unequal bargaining powers of Defendant and Plaintiff. For the same reason, it is likely that Defendant’s fraudulent business practice would deceive other members of the public.

68. Defendant’s practices is an unfair, unlawful and fraudulent bait and switch scheme.

69. Thus, Defendant’s conduct has violated the “fraudulent” prong of California Business & Professions Code § 17200.

UNLAWFUL

70. California Business and Professions Code Section 17200, et seq. prohibits “any unlawful...business act or practice.”

71. As explained above, Defendant deceived Plaintiff and other Class Members by deducting unauthorized sums from their accounts under a negative option scheme.

72. As explained above, such conduct constitutes an unlawful act under Cal. Bus. & Prof. Code § 17600, et seq., 15 U.S. Code § 8403, and EFTA.

73. Defendant's acts are therefore an "unlawful" business practice or act under Business and Professions Code Section 17200 et seq..

74. Defendant's conduct caused and continues to cause economic harm to Plaintiff and CAPRS Class Members.

COUNT III:
VIOLATION OF THE CONSUMER LEGAL REMEDIES ACT,
CAL. CIV. C. § 1750 ET. SEQ.
INDIVIDUALLY AND ON BEHALF OF THE CAPRS CLASS

75. Plaintiff incorporates by reference each allegation set forth above herein.

76. Defendant's actions as detailed above constitute a violation of the Consumer Legal Remedies Act, Cal. Civ. C. § 1750 et. seq. to the extent that Defendant violates the following provisions of the CLRA:

- a. Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve; *Cal. Civ. C. § 1770(a)(14)* and
- b. Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not. *Cal. Civ. C. § 1770(a)(16)*.

77. Plaintiff brings these claims for injunctive relief only pursuant to Cal. Civ. C. § 1782(d), though reserves the right to amend without leave of Court as provided for in this section after compliance with Cal. Civ. C. § 1782(a) or (b).

1 78. Plaintiff has filed the required venue affidavit as an attachment to this
2 Complaint.

3 **TRIAL BY JURY**

4 79. Pursuant to the seventh amendment to the Constitution of the United
5 States of America, Plaintiff is entitled to, and demands, a trial by jury.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiff, ANN FOX, individually, and on behalf of all
8 others similarly situated, respectfully requests judgment be entered against
9 Defendant, for the following:

- 10 a. That this action be certified as a class action on behalf of The
11 Classes and Plaintiff be appointed as the representative of The
12 Classes;
13 b. Statutory damages of \$1,000.00, per Class Member, pursuant to
14 the Electronic Fund Transfer Act, §916(a)(2)(A);
15 c. Actual damages;
16 d. Restitution of the funds improperly obtained by Defendant;
17 e. Any and all statutory enhanced damages;
18 f. All reasonable and necessary attorneys' fees and costs provided by
19 statute, common law or the Court's inherent power;
20 g. For equitable and injunctive and pursuant to California Business
21 and Professions Code § 17203 and Cal. Civ. C. § 1780 et. al.;
22 h. For prejudgment interest at the legal rate; and
23 i. Any other relief this Honorable Court deems appropriate.
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1 Respectfully submitted this 11th Day of February, 2021.

2 LAW OFFICES OF TODD M. FRIEDMAN, P.C.

3
4 By: /s/ Todd M. Friedman
5 Todd M. Friedman
6 Law Offices of Todd M. Friedman
7 Attorney for Plaintiff
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